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In The
Supreme Court of the United States

DOUG DECKER, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF ENVIRONMENTAL PROTECTION INFORMATION CENTER, THE SIERRA CLUB, WATERKEEPER ALLIANCE, ROGUE RIVERKEEPER, PUGET SOUNDKEEPER ALLIANCE, WILDLANDS CPR, AND ALLIANCE FOR THE WILD ROCKIES IN SUPPORT OF RESPONDENT

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Environmental Protection Information Center v. Pacific Lumber Co., 302 F.Supp.2d 1102 (N.D. Cal. 2004) 3

Environmental Protection Information Center v. Pacific Lumber Co., 266 F.Supp.2d 1101 (N.D. Cal. 2003) 3

Environmental Protection Information Center v. Pacific Lumber Co., 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) 3

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 6

Shell Oil Co. v. Train, 585 F.2d 408 (9th Cir. 1978) 7

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33 U.S.C. § 1311(a) 6

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33 U.S.C. § 1342(l)(2) 7

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33 U.S.C. § 1362(12) 6

33 U.S.C. § 1362(14) 6, 7

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40 C.F.R. § 122.26(a)(1)(ii) 11
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OTHER AUTHORITIES:

55 Fed. Reg. 47990 (Nov. 16, 1990) 20

60 Fed. Reg. 50913 (Sept. 29, 1995) 24

California Regional Water Quality Control Board, Central Valley Region, NPDES No. CAS082597, Stormwater Discharges From Municipal Separate Storm Sewer System, Sacramento County (Sept. 11, 2008) ("Sacramento Municipal Permit"), http://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/sacramento/r5-2008-0142.pdf 22

California Regional Water Quality Control Board, San Francisco Bay Region, "Wastewater," http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/wastewater.shtml 25

California State Water Resources Control Board, California 2010 303(d) Combined List Table, "303(d) list – Excel file (includes potential sources)," http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml 2

California State Water Resources Control Board, NPDES Permit No. CAS000001, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf 15, 23, 24

California State Water Resources Control Board, NPDES Permit No. CAS000003, http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/caltrans/caltranspmt.pdf 21

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California State Water Resources Control Board, NPDES Permit No. CAS000004, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/final_sm_ms4_fact_order.pdf 23

Caltrans, Statewide Stormwater Management Plan (May 2003), http://www.dot.ca.gov/hq/env/stormwater/pdf/CTSW_RT_02_008.pdf.....22

Environmental Protection Agency, "Authorization Status for EPA's Stormwater Construction and Industrial Programs," http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm (last visited October 18, 2012).....13

Environmental Protection Agency, Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity (MSGP), § 8.A.6, App. D-2 (May 27, 2009), http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf.....14, 15

Environmental Protection Agency, State Program Status, http://cfpub1.epa.gov/npdes/statestats.cfm?program_id=12.....7

Environmental Protection Agency, "National Pollutant Discharge Elimination System (NPDES)," http://cfpub.epa.gov/npdes/ 26

Michael E. Barber, et al., "Preliminary Environmental Investigation Of Heavy Metals In Highway Runoff," p. 1 (Nov. 21, 2006), http://www.wsdot.wa.gov/NR/rdonlyres/A3518878-820F-4EBD-9D47-C518AA2F8C91/0/PrelimEnvironmentalInvestigationHeavyMetals.pdf.....20

TABLE OF AUTHORITIES – Continued

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New Jersey Dep't of Environmental Protection, Highway Agency Stormwater General Permit, NJPDES Permit No. NJ0141887, http://www.nj.gov/dep/dwq/pdf/existing_highway_permit_final_2_27_09.pdf 22

Oregon Department of Environmental Quality, General Permit NPDES Storm Water Discharge Permit, Permit No. 1200-Z, http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200z/permit2012.pdf 15

Oregon Department of Forestry, Forest Practices Technical Note No. 8, Version 1.0 (June 20, 2003) 17, 18

State of Washington, Department of Ecology, Washington State Department of Transportation NPDES and State Waste Discharge Permit for Municipal Stormwater, Permit No. WAR043000A, http://www.ecy.wa.gov/programs/wq/stormwater/municipal/wsdot/docs2011/wsdotpermit030712.pdf 22

Texas Commission on Environmental Quality, General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, General Permit No. TXR050000, http://www.tceq.texas.gov/assets/public/permitting/stormwater/txr050000.pdf 15

Texas Forest Service, Texas Forestry Best Management Practices (August 2004), http://txforestservice.tamu.edu/uploadedfiles/sustainable/bmp/bmpbookindd.pdf 17, 18

TABLE OF AUTHORITIES – Continued

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Ventura County, Resource Management Division, Rincon/Grubb Oil Fields, Aerial Photography Map (Dec. 21, 2011), http://www.edcnet.org/learn/current_cases/cwa/Rincon-Grubb_OilFieldMap.pdf.....24

Vintage Production California LLC, Notice of Intent to Comply With the Terms of the General Permit to Discharge Storm Water Associated With Industrial Activity (WDID 4-56I-020994) (July 2, 2007), posted at https://smarts.waterboards.ca.gov/smarts/faces/PublicDataAccess/PublicNoiSearchResults.jsp.....24

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Environmental Protection Information Center, The Sierra Club, Waterkeeper Alliance, Rogue Riverkeeper, Puget Soundkeeper Alliance, Wildlands CPR, and Alliance For The Wild Rockies (collectively "EPIC *Amici*" or "*Amici*") submit this brief in support of Respondent Northwest Environmental Defense Center, urging the Court to affirm the decision below.[1] *Amici* are non-profit public interest organizations working to protect the environment, public health, and rural communities that rely on healthy rivers, streams, and estuaries. *Amici* have decades of experience and expertise participating in permitting, regulatory, and enforcement proceedings under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq*.

In particular, *Amici* have provided technical and legal expertise in numerous proceedings addressing water pollution problems caused by industrial logging operations in rivers, lakes and streams throughout the United States and the ongoing failure of State-level forestry programs to have prevented, by themselves, the degradation in water quality of

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this *Amicus Curiae* brief by filing blanket consents with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certifies that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than *Amici* and counsel made a monetary contribution specifically for the preparation or submission of this brief.

thousands of miles of rivers, streams and lakes. *Amici* have been intimately involved in the development, implementation, and enforcement of numerous general permits issued pursuant to the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") to address discharges of storm water from a multitude of municipal and industrial settings. All of these organizations together have hundreds of thousands of members and supporters who rely on waters flowing through areas of industrial logging for recreation, scientific study, and protection of their health, safety, property, drinking water and food supply.

Amicus Environmental Protection Information Center and its approximately 3,000 members are located in Northern California where the Eel River, Elk River, Freshwater Creek, Klamath River, Wooley Creek, Albion River, Big River, Gualala River, Navarro River, Pudding Creek, Ten Mile River, Redwood Creek, and Trinity River are all identified pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), by the State of California and the United States Environmental Protection Agency as failing to achieve beneficial uses and water quality standards specifically because of sediment discharges from logging roads in those watersheds. California State Water Resources Control Board, California 2010 303(d) Combined List Table, "303(d) list – Excel file (includes potential sources)," http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml. EPIC filed an *Amicus Curiae* brief with the Ninth Circuit in this action and was involved for many

years in litigation raising the same issues before the Northern District Court of California. *Environmental Protection Information Center v. Pacific Lumber Co.*, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003).[2]

Amicus The Sierra Club, founded in 1892, is the nation's oldest and largest grassroots environmental organization, with approximately 740,000 members nationwide. The Sierra Club has decades of experience addressing water pollution issues under both the Clean Water Act and State and Federal forestry and land management statutes.

Amici Waterkeeper Alliance, Rogue Riverkeeper, and Puget Soundkeeper Alliance are Waterkeeper organizations dedicated exclusively to water quality protection through education, scientific research and monitoring, advocacy, and enforcement. Waterkeeper Alliance is an international, non-profit organization based in the State of New York and serves as an umbrella organization comprised of nearly 200 member Waterkeeper programs in the United States and around the globe. Rogue Riverkeeper and Puget Soundkeeper Alliance are based in Ashland, Oregon and

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[2] *See also Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F.Supp.2d 803 (N.D. Cal. 2007); *Environmental Protection Information Center v. Pacific Lumber Co.*, 430 F.Supp.2d 996 (N.D. Cal. 2006); *Environmental Protection Information Center v. Pacific Lumber Co.*, 2004 WL 838160 (N.D. Cal. Apr. 19, 2004); *Environmental Protection Information Center v. Pacific Lumber Co.*, 302 F.Supp.2d 1102 (N.D. Cal. 2004); *Environmental Protection Information Center v. Pacific Lumber Co.*, 266 F.Supp.2d 1101 (N.D. Cal. 2003).

Seattle, Washington, respectively. These organizations' concentrated focus on the Clean Water Act and other water quality protection laws provides an informed and unique perspective on the issues before the Court.

Amicus Wildlands CPR is a non-profit environmental organization based in Missoula, Montana, with offices in Portland and Eugene, Oregon. Wildlands CPR works nationally with citizens, grassroots groups, tribes, and land managers to protect and restore natural areas, with a focus on rectifying the impacts from logging and other wildland roads to watersheds, terrestrial and aquatic species habitat, and municipal water supplies. Since 1994, Wildlands CPR has conducted scientific field studies documenting the aquatic and terrestrial impacts of roads resulting in numerous publications in peer-reviewed journals; conducted on-the-ground workshops attended by over 300 public land managers regarding the impacts of roads to aquatic systems; partnered with Tribes and universities to document the impacts of roads on wildlife and aquatic habitat and how to mitigate or restore the affected areas; and worked specifically with the Forest Service to improve their management of forest roads to reduce aquatic and terrestrial impacts. Wildlands CPR promotes the restoration of watersheds and rural economies through full maintenance of necessary roads and reclamation of ecologically damaging, unneeded roads – important sources of high-wage, high-skill jobs to people in rural communities.

Amicus Alliance For The Wild Rockies is a non-profit organization based in Helena, Montana, whose mission is to secure the ecological integrity of the Wild Rockies Bioregion through citizen empowerment, and the application of conservation biology, sustainable economic models and environmental law. Alliance For The Wild Rockies is frequently involved in water pollution issues related to logging roads.

The questions presented in this case have a critical and direct impact on whether the logging industry will be required to comply with the Clean Water Act's NPDES permitting requirement just like thousands of other industries, mom-and-pop businesses, state highway systems, and municipalities already are required to do. As organizations involved in environmental advocacy pursuant to the Clean Water Act as well as State and federal forestry laws, *Amici* have a unique perspective and interest in the outcome of this case.

STATUTORY BACKGROUND

"Beginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the [Clean Water Act] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See* 33 U.S.C. § 1251(a)(1). In furtherance of that goal, "[t]he Act established a comprehensive

scheme for federal regulation of water pollution, the National Pollut[ant] Discharge Elimination System [NPDES], as a means of achieving and enforcing effluent limitations." *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984).

The Act prohibits the discharge of any pollutants from any point sources, unless one or more carefully enumerated exceptions apply. 33 U.S.C. § 1311(a). One exception is a discharge authorized by an NPDES permit pursuant to section 402 of the Act. *Id.*; 33 U.S.C. §§ 1342(a); 1342(p)(2)(B). "The term 'discharge of pollutants' means (A) any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. § 1362(12). Such discharges include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man. . . ." 40 C.F.R. § 122.2. "Point source" is defined broadly by Congress as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

"Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Only where there is no discernable conveyance of polluted effluent, *i.e.*, no "point source," is a discharger relieved of having to obtain an NPDES

permit. The only exceptions to the NPDES permitting mandate have been expressly provided by Congress within the Act. *See, e.g.*, 33 U.S.C. § 1362(6) (certain vessel discharges); § 1342(l)(1) (agricultural return flows); § 1362(14) (same); § 1342(l)(2) (uncontaminated stormwater discharges at mine sites).

The NPDES permitting program is, in large part, managed by the individual States, with EPA playing an ancillary oversight role. The CWA requires EPA to delegate NPDES permit issuing authority to individual states upon the state meeting certain criteria. 33 U.S.C. § 1342(b)-(c). It was Congress' clear intention that the States "assume the major role in the operation of the NPDES program." *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). Indeed, that Congressional intent has been realized. 46 of the 50 States have been delegated authority to issue NPDES permits for their respective waters, EPA retaining only a limited authority to review and potentially (though in practice rarely) vetoing deficient permits. Environmental Protection Agency, State Program Status, http://cfpub1.epa.gov/npdes/statestats.cfm?program_id=12; 33 U.S.C. § 1342(c) (upon approval of a State's NPDES program, EPA must suspend its own issuance of permits within that State).

NPDES permits may be issued as either general permits or individual permits. 40 C.F.R. §§ 122.28, 122.21. General permits cover a large number of dischargers within specified categories. For example, 46 States have issued their own state-wide general permits for certain categories of discharges of storm

water associated with industrial activity. EPA has issued a nation-wide general permit for such discharges as well, covering the four States that have not opted to manage the NPDES program in their jurisdictions, Tribal lands, United States territories and some federal facilities. Where a general NPDES permit applies to a discharge, rather than apply for an individual permit and go through a detailed hearing process, an individual discharger need only file a "Notice of Intent" to operate under the existing general permit and proceed to comply with its terms. *See* 40 C.F.R. § 122.28(b)(2).

SUMMARY OF ARGUMENT

The EPIC *Amici* focus this brief *Amicus Curiae* on exposing many of Petitioners' *Amici*'s wholesale exaggeration of the infeasibility and difficulty of applying an NPDES permit to logging road discharges. A number of Petitioners' *Amici* argue that polluted storm water being discharged from logging roads is so distinct from storm water falling on other industrial operations and municipalities that it is impractical to regulate that pollution discharge through the CWA's NPDES permitting program. Other Petitioners' *Amici* claim that the sheer number of logging road outfalls and operators makes it inconceivable that EPA and the States could issue the NPDES permits anytime in the foreseeable future. However, much more complicated facilities than logging roads – for example, entire cities and counties – have been effectively

regulated with NPDES permits issued on a state or nation-wide basis. Indeed, applicable NPDES general permits for storm water associated with industrial activity already exist and can be used immediately to address logging road discharges.

ARGUMENT

I. This Case Is Limited To Industrial Logging Roads And Does Not Involve Every Forest Landowner In The United States.

The Court of Appeals' ruling is limited to holding that storm water discharged from point sources on two logging roads used for industrial logging must be subject to an NPDES permit. Pet. App. at 6-7, 44-48. Reading many of the briefs *Amici Curiae* filed in support of Petitioners, one would think that the Court of Appeals' ruling held that NPDES permits were required for every person who cuts down a tree on their property or uses a road on federal land. *See, e.g.*, American Forest Resource Council *Amicus* Brief at 13 (suggesting ruling on industrial logging roads would affect Bureau of Land Management off-highway vehicle uses); *id.* at 16 (invoking ranching families and claimed effects on grazing allotments); Pacific Legal Foundation *Amicus* Brief at 10 (loosely describing the Court of Appeals' ruling as "[e]xtending the NPDES to cover forest road runoff"). These scenarios attempt to expand the Court of Appeals' ruling well beyond its specific facts. In so doing, Petitioners' *Amici*

fail to respect the limited scope of the Court of Appeals' ruling.

The logging roads at issue, although owned by the State of Oregon, are specifically designated as "timber hauling routes." Joint Appendix ("JA") at 7-8, 19-20 (NEDC's First Amended Complaint). The logging roads are maintained by four logging companies as a condition of their licenses to conduct industrial scale logging in the Tillamook State Forest. *Id.* at 19-20. The roads are "primarily used by the [timber companies] to gain access to logging sites and to haul timber out of the forest." Petition Appendix ("Pet. App.") at 45-46. The Court of Appeals emphasized the importance of the road's primary use to its ruling that the road's storm water discharges are associated with industrial activity:

> We recognize that logging roads are often used for recreation, but that is not their primary use. Logging companies build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non:* If there were no logging, there would be no logging roads.

Id. There also is no dispute that the logging roads at issue are used by the logging companies to access their other log processing facilities. *Id.* And EPA's own regulations include logging operations as an industrial activity, identified by Standard Industrial Classification ("SIC") Code 2411. *Id.* at 44-45.

Because the discharges of pollutants alleged in NEDC's complaint plainly qualify as "discharges of stormwater associated with industrial activity," they require an NPDES permit. JA at 3, 14, 20-24, 31-35. *See* 33 U.S.C. § 1342(p)(2)(B); 40 C.F.R. § 122.26(a)(1)(ii) and (e)(1)(i). The Court of Appeals did not rule, as Petitioners' *Amici* suggest, that every road, or every non-commercial harvest of trees by a property owner, triggers an NPDES permitting process under Congress' industrial storm water provision. The dire consequences predicted by the various Petitioners' *Amici* are nothing more than red herrings attempting to divert the Court from the specific facts and limited scope of the Court of Appeals' ruling.

II. The CWA Does Not Require That An Individual Permit Be Issued For Every Point Source Or Every Landowner.

Petitioners' *Amici* briefs expend considerable effort inflating the number of NPDES permits that they predict will have to be processed and issued if the Court of Appeals' decision is upheld. Relying on their unsubstantiated, exaggerated numbers, Petitioners' *Amici* then predict chaos will ensue and EPA's and the State's NPDES-permitting programs will grind to a halt. *See, e.g.*, State of Arkansas *Amicus* Brief at 19; American Forest Research Council *Amicus* Brief at 10; Pacific Legal Foundation *Amicus* Brief at 13-15. None of the Petitioners' *Amici*'s self-serving exaggerations reflect the reality of the

NPDES permitting program's general permitting provisions or the existing NPDES general permits issued for every State and territory of the country that already are available for storm water discharges from industrial logging operations.

Both EPA and delegated States may issue general permits to regulate categories of dischargers. 40 C.F.R. § 122.28. EPA's regulations expressly authorize the use of general permits for "Storm water point sources." 40 C.F.R. § 122.28(a)(2)(i). Contrary to the *Amici* States' assertion, the general permit regulation does not require the States to first "conduct an inventory of the thousands, and in some instances millions, of miles of forest roads . . . " before a general permit can be issued. For "categories or subcategories of point sources *other than storm water point sources*[,]" Section 122.28(a)(2) does require EPA and States to find that the point source categories involve the same or similar operations, discharge the same types of waste, and require the same effluent limitations and monitoring. 40 C.F.R. § 122.28(a)(2)(i)(A)-(D). *Amici* States simply ignore that EPA authorizes general permits for storm water discharges without those findings.

III. Logging Road Dischargers Already Can Satisfy Their Duty To Obtain An NPDES Permit By Enrolling In Existing General Permits For Storm Water Associated With Industrial Activity.

General NPDES permits already have been issued and can be relied upon by any discharger of storm water associated with industrial activity anywhere in the United States or its territories. States and EPA were obligated to issue NPDES permits for industrial storm water discharges by not later than February 4, 1991. 33 U.S.C. § 1342(p)(4)(A).[3] Both EPA and the States have issued nation-wide (in the case of EPA) or state-wide general permits for industrial storm water discharges. Environmental Protection Agency, "Authorization Status for EPA's Stormwater Construction and Industrial Programs," http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm (last visited October 18, 2012). With the exception of Massachusetts, New Hampshire, New Mexico and Idaho, every other State already has issued a statewide general permit for industrial storm water discharges. *Id.* EPA's nation-wide permit covers those four States as well as remaining territories, a few federal facilities, and Indian Country. *Id.*

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[3] Congress provided an extension of time for certain municipalities discharging storm water associated with industrial activities. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, §1068, 105 Stat. 1914, 2007-2008 (1991).

Industrial logging road operators already could comply with these general permits to satisfy their permit obligation. For example, EPA's 2009 Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity ("MSGP"), originally issued in 1995, specifically identifies SIC Code 2411 as an industrial sector that is governed by the MSGP. Environmental Protection Agency, Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity (MSGP), § 8.A.6, App. D-2 (May 27, 2009), http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf. SIC Code 2411 defines "logging" as "establishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field." Pet. App. 45. To obtain NPDES permit coverage under the MSGP, an industrial logging road operator or owner must file a "notice of intent." MSGP, § 1.3.1. The permittee would have to implement best management practices ("BMPs"). *Id.*, § 2.1. The permittee would need to prepare a storm water pollution prevention plan describing the BMPs applicable to their logging roads. *Id.*, § 5. By design, the MSGP is imbued with flexibility to allow the variety of storm water discharges to adjust some of the requirements in order to accommodate the variety, type, and sizes of operations. For example, where a logging road has two or more outfalls that the discharger "believe[s] discharge substantially identical effluents," quarterly visual observations may be done on a rotating basis rather than for each outfall every quarter. *Id.*, § 4.2.1. Likewise, the number of outfalls from which storm water is to

be sampled also can be reduced based on the presence of substantially identical outfalls with similar exposed pollution sources, and similar control measures and runoff volumes. *Id.*, § 6.1.1. Nor are dischargers enrolled in the MSGP required to submit new applications every five years in order to maintain their coverage. *Id.*, § 1.3.2.

The many existing State industrial storm water permits are largely modeled on the MSGP, containing the same basic enrollment requirements and flexibility to manage the visual inspections and monitoring, especially for larger facilities. *See, e.g.*, California State Water Resources Control Board, NPDES Permit No. CAS000001, http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf; Texas Commission on Environmental Quality, General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, General Permit No. TXR050000, http://www.tceq.texas.gov/assets/public/permitting/stormwater/txr050000.pdf; Oregon Department of Environmental Quality, General Permit NPDES Storm Water Discharge Permit, Permit No. 1200-Z, http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200z/permit2012.pdf. These permits have been in place for 15 years or longer and are designed to accommodate thousands of permittees, and have done so without an undue burden on the overseeing state agencies or EPA.

As a result, and certainly in the near term, industrial logging road operators or owners can simply

plug in to the existing general NPDES permits which already cover their discharges. Contrary to Petitioners' *Amici*'s claims, no time is necessary for any State agencies or EPA to issue a new industrial storm water general permit to address industrial logging roads. The deluge of new permits, "chaos" and general assertions of infeasibility predicted by various Petitioners' *Amici* are not based on reasoned analysis of the existing regulations or permitting systems, but rather unconstrained advocacy positions.

IV. NPDES Permits Focus On The Precise Locations Where Logging Roads Discharge Pollutants To Waters And Will Encourage Logging Roads To Maximize The Use Of Non-Point Source BMPs That Eliminate Or Reduce Point Source Discharges.

A number of Petitioners' *Amici* claim that applying the NPDES permitting program to logging roads would undermine or unnecessarily replicate the BMP-based regulations currently relied upon by the States and federal agencies to maintain logging roads and address the roads' sediment and turbidity pollution. *See* State of Arkansas *Amici* Brief at 15-19. On the contrary, a general NPDES permit for logging road discharges compliments the non-point source BMP programs already in place by encouraging logging road operators to fully implement non-point source BMPs and limit the number of point sources discharging sediment from their roads. By taking measures to ensure as much as possible of their

logging road discharges filter into adjacent hillsides and lands and do not enter any stream or waterbody, operators would keep the vast majority of logging road discharges out of the NPDES permit's provisions. The NPDES permit for a logging road would directly ensure the proper implementation and monitoring of BMPs only on the logging roads' remaining **point source** discharges, *i.e.*, stream-crossing culverts and other discharges directly into streams and channels – the source of water pollution from logging roads.

NPDES permits for storm water discharges may, and do, rely upon BMPs as the basis for effluent limitations. 40 C.F.R. § 122.44(k) (NPDES permits shall include "Best management practices (BMPs) to control or abate the discharge of pollutants when: . . . (2) Authorized under section 402(p) of the CWA [33 U.S.C. § 1342(p)] for the control of storm water discharges"). *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005) ("site-specific BMPs are effluent limitations under the CWA"). Storm water discharges from unpaved logging roads are dominated by a single pollutant – sediment or turbidity. JA at 15. The BMPs addressing potential sediment and turbidity discharges from logging roads are relatively well-understood. *See, e.g.*, Texas Forest Service, Texas Forestry Best Management Practices (August 2004), http://txforestservice.tamu.edu/uploadedfiles/sustainable/bmp/bmpbookindd.pdf. *See also* JA at 78-84 (Oregon Department of Forestry, Forest Practices Technical Note No. 8, Version 1.0 (June 20, 2003)). Although

different BMPs would apply to different road-surfaces and locations, the suite of typical BMPs is the same. *See id.* Numerous BMP manuals have been published describing the typical BMPs applicable to unpaved logging roads. *See, e.g., id.* Such BMPs include, for example, properly spaced cross-drains, culverts, rolling dips, wing ditches, and water bars that channel storm water off of the road onto the adjacent slope or area in smaller volumes that seep into the adjacent soil without forming a gulley or erosion channel or discharging to waters. *See* Texas BMPs at 30-47; JA at 78-84. As a result, on a well-maintained logging road, the volume of polluted runoff discharged from point sources to a stream or creek should be limited to readily-identifiable and relatively small portions of the logging road. The levels of sediment and turbidity in the remaining storm water flows that are channeled to waters of the United States at stream crossings or adjacent waters would be controlled through the use of stone or aggregate on road surfaces, riprap, geotextile fabric, velocity reducers and other erosion control measures. Texas BMPs at 48-49.

Applying the NPDES permitting requirement to logging roads encourages logging operators to vigorously implement these runoff-reducing BMPs. On a properly maintained logging road, the vast majority of runoff locations should be dispersed via cross-drains onto the adjacent lands rather than into any gullies, creeks or streams. These areas would not be point sources, never discharging to any waters or their tributaries.

The NPDES permitting requirements would apply to make sure actual point source discharges were limited and properly controlled at stream crossings where the logging road passes over a water of the United States or its tributary, or other outfalls where logging roads are adjacent to stream channels. The NPDES Permit, because of its focus on point source discharges, would focus on the logging roads' key problem areas where sediment is conveyed to waterways. By layering in better information about these actual discharge locations, reasonable monitoring requirements, and assuring that those discharges comply with applicable water quality standards, the NPDES program would ensure that shortcomings in the existing forestry programs in Oregon and around the country would be addressed by the expert water quality agencies and meet the important water quality goals of the Clean Water Act. *See* Northwest Environmental Advocates *Amicus Curiae* Brief.

V. NPDES Permits Have Been Readily Developed For Much More Complicated Storm Water Discharges Than Those From Logging Roads.

Petitioners' *Amici* argue that attempting to develop NPDES permits for logging roads will overwhelm EPA and the various State permitting agencies. *See, e.g.*, Pacific Legal Foundation Brief at 15. This assertion overlooks the fact that logging road operators may enroll right now under existing NPDES general permits. *See, supra*, pp. 13-16. And even if the States

or EPA opted to prepare specific general permits for industrial logging roads, such permits would be much simpler than the many storm water permits already issued by the States and EPA.[4]

EPA and the States have issued NPDES permits that effectively regulate storm water discharges from cities, including their roads, from highway systems, and from a wide variety of "industrial" facilities. *See* 33 U.S.C. § 1342(p)(2)-(3). Discharges from a large city's storm water system are infinitely more varied in terms of types of pollutants, volumes of storm water, and variety of point sources than storm water discharges from logging roads. 55 Fed. Reg. 47990, 47991-92 (Nov. 16, 1990). Storm water discharges from highways and municipal roads also are generally larger and more varied than discharges from a logging road. *See, e.g.*, Michael E. Barber, et al., "Preliminary Environmental Investigation Of Heavy Metals In Highway Runoff," p. 1 (Nov. 21, 2006), http://www.wsdot.wa.gov/NR/rdonlyres/A3518878-820F-4EBD-9D47-C518AA2F8C91/0/PrelimEnvironmentalInvestigationHeavyMetals.pdf ("Federal Highway Administration (FHWA) identifies cadmium, chromium, copper, iron, lead, nickel, and zinc as the metals typically associated

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[4] *Amici* Pacific Legal Foundation's attempt to compare a general storm water permit to EPA's initial effort to craft a NPDES permit for ballast water discharges from ships is unhelpful. Pacific Legal Foundation *Amici* Br. at 16. Ballast water discharges are not storm water. Treating ballast from ships raises entirely unique technical questions unrelated to logging roads.

with highway runoff"). Industrial facilities spanning a large array of activities, including many that are not traditionally identified as "industrial" such as construction sites, landfills, and open dumps – each with its own assortment of pollutant sources, facilities and operations – discharge storm water with a large variety of pollutants from every conceivable form of outfall. *See* MSGP at 47-138.

The NPDES permitting system has proven itself adaptable to handle these sprawling water pollution challenges, allowing for effective regulation and oversight without undue burdens disproportionate to addressing the pollution discharges at issue. Storm water discharges from logging roads are relatively homogeneous when compared to these other storm water discharges regulated by NPDES permits under the CWA. There is no empirical evidence demonstrating that the NPDES permitting program cannot readily address the relatively simple category of logging road point source discharges.

NPDES permits have been issued that are effectively regulating storm water discharges from roads. For example, in 1992, pursuant to its delegated NPDES-permitting authority, the State of California issued and continues to maintain and update an NPDES permit that covers all point source discharges from the California Department of Transportation's highway system. California State Water Resources Control Board, NPDES Permit No. CAS000003, http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/caltrans/caltranspmt.pdf. The breadth of this

general NPDES permit and the variety of roadway point sources it addresses dwarfs the relatively repetitive discharge-types associated with unpaved logging roads. *See* Caltrans, Statewide Stormwater Management Plan (May 2003), http://www.dot.ca.gov/hq/env/stormwater/pdf/CTSW_RT_02_008.pdf. Other states also have issued NPDES permits for discharges from highways and roads. *See, e.g.*, New Jersey Dep't of Environmental Protection, Highway Agency Stormwater General Permit, NJPDES Permit No. NJ0141887, http://www.nj.gov/dep/dwq/pdf/existing_highway_permit_final_2_27_09.pdf; State of Washington, Department of Ecology, Washington State Department of Transportation NPDES and State Waste Discharge Permit for Municipal Stormwater, Permit No. WAR043000A, http://www.ecy.wa.gov/programs/wq/stormwater/municipal/wsdot/docs2011/wsdotpermit030712.pdf.

Similarly, throughout the country, EPA and the 46 delegated States have issued NPDES permits for large, medium, and small municipalities, including storm water discharges from each and every road included in those cities' and counties' jurisdiction. *See, e.g.*, California Regional Water Quality Control Board, Central Valley Region, NPDES No. CAS082597, Stormwater Discharges From Municipal Separate Storm Sewer System, Sacramento County (Sept. 11, 2008) ("Sacramento Municipal Permit"), http://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/sacramento/r5-2008-0142.pdf. Again, the variety of discharges and outfall types addressed by these municipal permits is much more diverse than the discharges

and outfall types encountered on logging roads. Large and medium municipalities include, generally, urban areas with populations of 250,000 and 100,000 persons or greater, respectively. 40 C.F.R. § 122.26(b)(4) & (7). The larger municipality permits tend to be issued on a city- or county-wide basis. *See, e.g.*, Sacramento Municipal Permit. As for smaller municipalities, that term applies not only to smaller cities but also to other public entities, including sewage districts, flood control districts, and similar entities. 40 C.F.R. § 122.26(b)(16). These NPDES permits have been issued on a state-wide basis. *See* California State Water Resources Control Board, NPDES Permit No. CAS000004, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/final_sm_ms4_fact_order.pdf. The small municipal permit requirements specifically cover "highways and other thoroughfares." 40 C.F.R. § 122.26(b)(16)(iii).

The "multi-sector" NPDES permits issued for the last twenty years to industrial storm water dischargers also are a testament to the ability of EPA and the States to issue a single permit covering entire States, or in the case of EPA, the remainder of the country and its territories, that effectively address unquantified numbers of point source discharges in every variety of climate and location and covering a diverse array of industry types and associated pollutants. *See, e.g.*, California State Water Resources Control Board, NPDES Permit No. CAS000001, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf. Access roads are included.

Id., Attachment 4, p. 2. The range of the industrial storm water NPDES permits is much greater than that necessary to address the relatively simple category of storm water discharges from logging roads. Indeed, as discussed above, the existing industrial storm water NPDES permits already encompass or can be readily applied to storm water discharges from logging roads.

Lastly, industrial sectors involving large networks of paved and unpaved roads have been permitted through industrial storm water NPDES permits. Oil and gas fields which have experienced spills of oil or other hazardous materials in quantities reportable to EPA are subject to the industrial storm water NPDES permitting requirements. 40 C.F.R. § 122.26(c)(1)(iii); 60 Fed. Reg. 50913 (Sept. 29, 1995) ("[t]his includes storm water discharges from access roads. . . ."). For example, in California, several oil and gas fields operated within the State encompassing large geographic areas, are enrolled in the General Industrial Stormwater Permit. *See, e.g.*, Vintage Production California LLC, Notice of Intent to Comply With the Terms of the General Permit to Discharge Storm Water Associated With Industrial Activity (WDID 4-56I-020994) (July 2, 2007) (oil and gas field facility encompassing 4,236 acres), posted at https://smarts.waterboards.ca.gov/smarts/faces/PublicDataAccess/PublicNoiSearchResults.jsp; Ventura County, Resource Management Division, Rincon/Grubb Oil Fields, Aerial Photography Map (Dec. 21, 2011), http://www.edcnet.org/learn/current_cases/cwa/Rincon-Grubb_

OilFieldMap.pdf (showing extensive road network). It is no less feasible for industrial logging operations to enroll in a general permit for storm water discharges from their roads.

The authority and ability of EPA and the delegated States to issue NPDES permits addressing storm water discharges from roads in both municipal and industrial contexts addressing thousands of cities and tens of thousands of industrial facilities throughout the country directly refutes the dire and unsubstantiated predictions presented by various *Amici* in support of Petitioners. "Chaos" has not resulted from EPA's and the State's issuance of NPDES permits governing municipalities, transportation departments and industrial roads. Requiring industrial logging road operators or owners to access the existing general NPDES industrial storm water permits adopted by EPA and 46 States is not a significant burden for any discharger or regulatory agency.

CONCLUSION

The NPDES permitting program is one of the most successful and effective pollution control programs ever devised. *See, e.g.*, California Regional Water Quality Control Board, San Francisco Bay Region, "Wastewater," http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/wastewater.shtml ("The NPDES program is one of the most successful environmental

programs ever implemented"); Environmental Protection Agency, "National Pollutant Discharge Elimination System (NPDES)," http://cfpub.epa.gov/npdes/ ("Since its introduction in 1972, the NPDES permit program is responsible for significant improvements to our Nation's water quality"). The EPIC *Amici* respectfully request that the Supreme Court uphold the Ninth Circuit Court of Appeals' decision enforcing the Clean Water Act's clear requirement that operators of roads primarily involved in logging obtain and comply with NPDES permits applicable to their point source discharges.

Respectfully submitted,

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